Nos. 16-1436 and 16-1540

IN THE

Supreme Court of the United States

FILED
SEP 18 2017
OFFICE OF THE CLERK
SUPREME COURT, U.S.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

STATE OF HAWAI'I, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE FOURTH AND NINTH CIRCUITS

BRIEF FOR THE STATES OF NEW YORK, ILLINOIS, CALIFORNIA, CONNECTICUT, DELAWARE, IOWA, MAINE, MARYLAND, MASSACHUSETTS, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AND THE DISTRICT OF COLUMBIA, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether respondents' challenges to §§ 2(c), 6(a), and 6(b) of Executive Order No. 13,780 are justiciable.

2. Whether §§ 2(c), 6(a), and 6(b) of the Order violate the Establishment Clause and exceed the President's authority under the Immigration and Nationality Act.

3. Whether the nationwide scope of the preliminary injunctions is proper.

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INTEREST OF THE AMICI STATES AND SUMMARY OF ARGUMENT

These consolidated cases challenge the legality of certain provisions of Executive Order No. 13,780, which among other things imposed a 90-day ban on the entry to the United States of nationals from six overwhelmingly Muslim countries, suspended the U.S. Refugee Admissions Program, and lowered the Program's refugee cap.[1] Two district courts entered preliminary injunctions against enforcement of the disputed provisions of the Order, and the injunctions were affirmed by the United States Courts of Appeals for the Fourth and Ninth Circuits. Amici States New York, Illinois, California, Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia submit this brief as amici curiae in support of plaintiffs-respondents, who seek affirmance of those decisions.[2] Amici States submit this brief to explain the ways in which the States are particularly harmed by the Executive Order, and to show that these state harms are cognizable under both the Establishment Clause of the First Amendment and the Immigration and Nationality Act (INA), that States as well as private parties have standing to challenge the Order on these grounds, and that the pervasive nationwide harm inflicted and threatened by the Order makes nationwide injunctive relief appropriate.

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[1] Executive Order No. 13,780, §§ 2(c), 6(a)-(b) (Mar. 6, 2017), 82 Fed. Reg. 13,209 (Mar. 9, 2017).

[2] The amici States file this brief pursuant to Supreme Court Rule 37.4.

Amici have a strong interest in respondents' challenges to the Order, and to its travel ban in particular, which has already caused—and absent the continuation of the injunctions, will continue to cause—substantial harm to our universities, hospitals, businesses, communities, and residents. Like plaintiffs here, many of the amici States have brought suits challenging this Executive Order and its January 27 predecessor[3] on the grounds that certain provisions of those Orders violate the Establishment Clause of the First Amendment and various other constitutional and statutory provisions.[4] Most of the amici States have also previously filed briefs as amici curiae in both of the cases now before this Court.[5]

Absent the injunctions at issue here, enforcement of the disputed provisions of the Order will cause immediate and concrete harms to the sovereign, quasi-sovereign, and proprietary interests of States,

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[3] Executive Order No. 13,769 (Jan. 27, 2017), 82 Fed. Reg. 8,977 (Feb. 1, 2017).

[4] Many of the amici States challenged this Executive Order in *Washington v. Trump*, No. 17-cv-141 (W.D. Wash. 2017) (stayed pending appeal in *Hawaii v. Trump*). They challenged the predecessor Order in *Washington v. Trump*, No. 17-cv-141, 2017 WL 462040 (W.D. Wash. 2017), *stay pending appeal denied*, 847 F.3d 1151 (9th Cir. 2017); Mass. & N.Y. Amicus Br. (15 States and D.C.), *Washington v. Trump*, No. 17-141 (9th Cir. 2017), ECF No. 58-2; *Aziz v. Trump*, No. 17-cv-116, 2017 WL 580855 (E.D. Va. 2017).

[5] Va. Amicus Br. (15 States and D.C.), *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 12, 2017); N.Y. Amicus Br. (15 States and D.C.), *Trump v. IRAP*, Nos. 16-A1190, 16A-1191 (Sup. Ct. June 12, 2017); Ill. Amicus Br. (15 States and D.C.), *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125; Va. & Md. Amicus Br. (15 States and D.C.), *IRAP v. Trump*, No. 17-1351 (4th Cir. Apr. 19, 2017), ECF No. 153.

including the amici States submitting this brief. Indeed, some of these harms have already occurred as a result of the provisions being challenged here and similar provisions set forth in the initial January 27 Executive Order. While the amici States differ in many ways, all benefit from immigration, tourism, and international travel by students, academics, skilled professionals, and businesspeople. The disputed provisions of the Order have significantly disrupted the ability of our States' public colleges and universities to recruit and retain students and faculty, impairing academic staffing and research needs, and causing the loss of tuition and tax revenues, among other costs. The Order has also disrupted the provision of medical care at the States' hospitals and harmed our science, technology, finance, and tourism industries by inhibiting the free exchange of information, ideas, and talent between the six designated countries and our States, causing long-term economic and reputational damage. In addition, the Order's travel ban and exclusion of refugees made it more difficult for the States to effectuate our own constitutional and statutory policies of religious tolerance and nondiscrimination.

The harms that the Order has caused and threatens to cause amici States and their residents are representative of the injuries experienced by respondents here. And those injuries underscore respondents' standing to sue and the appropriateness of the preliminary relief ordered by the courts below.

First, in addition to violating the Establishment Clause rights of individuals, the disputed provisions of the Order have resulted in cognizable injuries to sovereign interests of the States that the

Establishment Clause protects. The disputed provisions have the purpose and effect of implementing a federal anti-Muslim policy—and that, in turn, interferes with amici States' efforts to combat religious discrimination within their borders. The injury inflicted on the States is especially salient at our institutions of higher education, where § 2(c) interferes with the recruitment and retention of students and faculty alike.

Second, the Order has injured rights conferred on the amici States and others by the INA. As to the States, the Order has impermissibly interfered with the process that Congress has set forth for our public colleges, universities, and hospitals—as employers—to petition for the approval of prospective employees' entry into the United States.

Finally, the nature of these violations and all of the substantial and systemic harms to the States' myriad interests supports the nationwide injunctions issued here. The preliminary injunctions entered by the district courts in these cases, as modified by this Court's June 26 decision, have provided critical protection to the state interests endangered by the disputed provisions of the Order and have mitigated the extent of the harms outlined above. But the possibility that the Order may ultimately be enforced continues to deter potential students, faculty, tourists, business travelers, and others from making plans to travel to the United States, and thus continues to threaten harm to the interests of the amici States. The amici States therefore urge this Court to affirm the injunctions in their entirety.

ARGUMENT

I. The Executive Order Has Harmed the States

A. Harms to States' Proprietary Interests

The disputed provisions of the Order block the entry of all refugees, as well as nationals from the six designated countries who seek to be students and faculty at our public universities, physicians and researchers at our medical institutions, employees of our businesses, and guests who contribute to our economies when they come here as tourists or for family visits. These provisions thus harm the work of our state institutions and adversely affect our state treasuries.[6] Indeed, defendants do not dispute that these harms have occurred. See *infra* at 18.

Harms to State Colleges and Universities. State colleges and universities rely on faculty and students from across the world. For example, "top-ranked research institution[s]," such as the University of Massachusetts, "*must hire* qualified research faculty from around the world to continue [their] significant research enterprise."[7]

By interfering with the entry of faculty and scholars from the six designated countries, the

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[6] All of the amici States support the legal arguments put forth in this brief, although not every specified harm occurs in every State. For example, almost all amici States operate state hospitals, but Delaware does not.

[7] Decl. of Deirdre Heatwole, Ex. A, ¶ 8 (University spent over $650 million last year in its research endeavors). All declarations cited in this brief are attached as exhibits to Illinois' Amicus Br., *Hawaii v. Trump*, No. 17-15589 (9th Cir. Apr. 20, 2017), ECF No. 125.

disputed provisions of the Order have seriously disrupted our public institutions' ability to meet academic staffing needs, resulting in increased administrative burdens and the expenditure of additional university resources. The announcement of the travel ban created serious doubt as to whether researchers from the designated countries would be able to obtain the visas they needed to timely assume positions they had accepted with public universities in the amici States, and as to whether they would still be willing to take the positions.[8] Public universities thus had to engage in additional negotiations with scholars who were concerned about moving to the United States in the shadow of the travel ban.[9] Furthermore, the timing of the ban—coinciding with the peak faculty hiring season—made it practically impossible for institutions to interview and hire new candidates from the six designated countries for the 2017-18 academic year, because § 2(c) purported to bar those individuals from entering the United States.[10]

The ability of state universities to retain their existing foreign faculty has also been compromised. For example, the University of Massachusetts employs, across a range of academic departments, approximately 130 foreign nationals from the affected countries who are neither U.S. citizens nor lawful permanent residents.[11] And the University of Maryland relies on over 200 graduate students, post-

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[8] Decl. of Michael F. Collins, Ex. C, ¶ 9; Decl. of Vita C. Rabinowitz, Ex. B, ¶ 21.

[9] *See, e.g.*, Rabinowitz Decl. ¶ 21.

[10] Heatwole Decl. ¶¶ 8-10.

[11] *Id.* ¶¶ 4-5.

doctoral fellows, and faculty from the designated countries to staff its scientific research laboratories; the loss of any one of these highly-trained employees "will disrupt work and delay progress for an entire lab."[12] Those whose visas expire during the term of § 2(c) (or any possible extension of the travel ban) will face obstacles to renewal that could jeopardize not only their employment but also any grant funding and scientific research projects that depend on their work. And those whose visas remain valid may be unwilling to take the risk of participating in professional or personal obligations that require travel outside the United States, and will face the hardship of being unable to receive visits from their parents, spouses, children, and other relatives.[13]

The foreign-national faculty employed by or recruited by our state universities typically have specialized expertise that cannot easily be replaced. Universities that are delayed in or prevented from recruiting international faculty and related staff thus suffer significant financial and reputational harm, including delayed or lost federal funding for research efforts.[14] Our educational institutions have needed to expend considerable amounts of scarce university resources (up to thousands of dollars per campus) to

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[12] Decl. of Ross D. Lewin, Ex. F, ¶ 8.

[13] Heatwole Decl. ¶¶ 10, 15, 18; Rabinowitz Decl. ¶ 21; Collins Decl. ¶¶ 9, 13-14; Lewin Decl. ¶¶ 4, 8; *see also* Decl. of Margaret Everett, Ex. H, ¶¶ 12-13 (visiting researcher who was an Iranian national unable to return from a family visit outside the country to complete his important research at Portland State University).

[14] Heatwole Decl. ¶¶ 8, 10, 18-19; Collins Decl. ¶ 9.

make contingency plans for filling the unexpected gaps in faculty rosters caused by the exclusion or possible departure of scholars from the six designated countries. There is no guarantee, moreover, that our universities will be able to meet all of their needs.[15]

Similarly, by disrupting the ability of these institutions to recruit and retain foreign students from the designated countries, the Executive Order has imperiled hundreds of millions of tuition dollars and other revenue generated from such students, as well as important academic research projects. Before the travel ban was announced, the public colleges and universities of the amici States had enrolled thousands of students from the six designated countries for the 2016-17 academic year. For example, the University of California's six largest campuses had over 400 such undergraduates, graduate students, and medical residents.[16] The University of Illinois, the University of Massachusetts, and the State University of New York each had approximately 300 such students in undergraduate and/or graduate programs.[17] And Oregon State University and

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[15] Heatwole Decl. ¶¶ 10-11, 16; Collins Decl. ¶¶ 4-5, 9-10; Decl. of Marcellette G. Williams, Ex. D, ¶¶ 8-9.

[16] Information provided to the California Attorney General's Office in April 2017 by the Institutional Research and Academic Planning Division of the University of California and by the Assistant Vice Chancellor of International and Off-Campus Programs at the California State University System.

[17] Williams Decl. ¶ 3 (Massachusetts figures). Other figures provided in early 2017 to the Illinois Attorney General's Office by the general counsel of the University of Illinois and to the New York Attorney General's Office by the general counsel of the State University of New York.

Washington State University each had approximately 160 such students.[18]

Likewise, before the ban, the amici States' colleges and universities had already made numerous offers of admission for the 2017-18 academic year to students from the affected countries and—but for § 2(c)'s interference with their continuing admissions process—might have admitted many more.[19] Some students from the six designated countries have withdrawn applications, while others have had to abandon entirely their plans to enroll in our university programs due to the ban. As a result, our public educational institutions have had to incur substantial administrative and other costs to fill the gaps left by students who can no longer accept offers of admission or attend.

While public colleges and universities are always subject to federal immigration law and policy, § 2(c) injured them unexpectedly, by upending with no advance notice the established framework around which they have designed their enrollment processes.[20] This has left seats unfilled, tuition dollars

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[18] Decl. of Ronald L. Adams, Ex. E, ¶ 8; Decl. of Asif Chaudhry, Ex. J, ¶ 5.

[19] Heatwole Decl. ¶¶ 14, 17 (University of Massachusetts had extended at least 40 such offers and has had to take into account the effect of § 2(c) in considering other applications).

[20] *Id.* ¶¶ 15, 17; *see also* Sam Petulla, *Entry Ban Could Cause Doctor Shortages in Trump Territory, New Research Finds*, NBC News (Mar. 7, 2017) (internet) (University of Massachusetts and others have had to "shift[ ] their recruitment strategies to avoid a talent drought"). (For authorities available on the internet, full URLs are listed in the table of authorities.)

irretrievably lost, and important academic programs and research projects in peril.

For example, ten Iranian students admitted to the Ph.D. program in civil engineering at the University of Illinois at Chicago in 2017 were blocked from enrolling due to the travel ban.[21] Not only did the university bear the financial loss of the tuition and other revenue these students would have brought in—and which could not be replaced by admitting other candidates at that late stage—but because these ten students constituted roughly half of the department's newly admitted doctoral students, some of the department's research projects are also in jeopardy.[22] At the University of Washington, 28 graduate students from the designated nations had been admitted for the Fall 2017 term, but several students withdrew their applications and others may be unable to matriculate, leaving additional seats unfilled.[23] This is of particular concern for some of the University's programs which "need to have all of their [graduate seats] filled each year in order to meet their program budgets."[24] Oregon stands to lose tuition revenue from 13 international students admitted to Portland State University in 2017 from the designated countries whose seats could not be filled if they were unable to enroll.[25]

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[21] Miles Bryan, *10 Prospective UIC Students Ineligible to Enroll Due to Travel Ban*, WBEZ News (Mar. 6, 2017) (internet).

[22] *See id.*

[23] Decl. of David Eaton, Ex. G, ¶¶ 3-5 and exhibits.

[24] *Id.* ¶ 4.

[25] Everett Decl. ¶¶ 15-16.

Application of § 2(c) also seriously jeopardizes the continued enrollment in our state colleges and universities of current students from these nations, by preventing them from traveling for research, conferences, and family visits.[26] Because only single-entry visas are permitted for two of the countries, and because the required visas are valid only for relatively short periods, most students need to apply for new visas during the course of their academic studies.[27] In other words, foreign students on single-entry visas who have relied on the existing preliminary injunctions—whether to return home to visit family, conduct research in other countries, or travel abroad for other reasons—face the prospect of being denied a visa to reenter the United States if enforcement of the ban is permitted.[28] Moreover, even if such students decide to put off their own travel, they will still face the hardship of being unable to receive visits from their parents, spouses, children, and other relatives.

The preliminary injunctions as modified by this Court currently protect these students' rights to

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[26] Chaudhry Decl. ¶¶ 5-8 (describing specific cases of Washington State University students and faculty from the designated countries); Decl. of Hassan Ghasemzadeh, Ex.I, ¶ 1 of exhibit A (same).

[27] U. S. Dep't of State, Bureau of Consular Affairs, *Reciprocity and Civil Documents by Country* (internet) (search by country and visa types F and M).

[28] Williams Decl. ¶¶ 7, 9 (University of Massachusetts doctoral student who traveled to designated country to get married and was unable to return); Adams Decl. ¶ 12 (similar experience of student at Oregon State University); Lewin Decl. ¶ 5 (concern that ban would delay visa renewal of University of Maryland student "impeding his academic progress and the University research in which he is engaged").

receive such family visits as well as their ability to return and resume their studies here if they themselves travel. But those protections would be lost if the injunctions were vacated and the travel ban were reinstated. Students from the six countries would then experience renewed pressure to cancel their enrollment in programs that exceed their visa duration periods, given that they can have no confidence that their visas will be renewed to enable them to complete their studies, particularly if any new and possibly expanded travel ban is implemented.[29]

Section 2(c) has also harmed and will continue to harm our educational institutions' core missions of excellence in education and scholarship. The loss of students, scholars, and faculty from the affected nations not only impairs important academic and medical research at our States' universities and colleges, but also inhibits the free exchange of information, ideas, and talent that is so essential to academic life and our state universities' missions.[30]

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[29] Although the Executive Order gives consular officers discretion to waive the travel ban in individual cases, the discretionary nature of the review process means such individuals have no assurance of re-admission. The Order does not describe the process for applying for a waiver, specify a time frame for receiving a waiver, or set any concrete guidelines for issuance of a waiver beyond providing a list of circumstances in which waivers "could be appropriate." Order § 3(c). And there is no guarantee that a waiver will be issued because the ultimate decision on whether to issue it lies solely within a consular official's discretion. *See id.*

[30] Heatwole Decl. ¶¶ 3, 8, 18; Williams Decl. ¶¶ 2, 8, 11-12; Lewin Decl, ¶¶ 4, 8, 12-13; Everett Decl. ¶¶ 3-4; *see also* Rabinowitz Decl. ¶¶ 4, 22 (public university in New York seeks to provide its students "global perspectives" and expose them "to

Harms to State Hospitals and Medical Institutions. Section § 2(c) has created staffing disruptions in state hospitals and medical institutions, which employ physicians, medical residents, research faculty, and other professionals from the designated countries. For example, the University of Massachusetts Medical School has extended job offers that have already been accepted by two medical professionals from the designated countries. But the university and these would-be employees are still waiting for visas to be approved and are uncertain if and when the contemplated employment can begin.[31]

Similar disruption has also occurred in the context of medical residency staffing at public hospitals. Medical residents often provide crucial services, such as caring for some of the most underserved populations in our States.[32] They are assigned to our state university hospital residency programs through a computerized "match" that, after applications and interviews, ranks and assigns residency candidates to programs nationwide; programs and candidates are advised of match results in the spring of each calendar year and all new residents begin their positions on July 1.[33]

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different cultures and ideas"); Heatwole Decl. ¶¶ 15, 19 ("[h]igher education is very much international in nature" and part of university mission is "to teach and support a diverse student body, enriched by a culture of inclusiveness").

[31] Collins Decl. ¶ 9.

[32] See *infra* at 19-20 & accompanying notes; *see also* Collins Decl. ¶ 8 (state hospital "relies on [r]esidents as part of their patient care workforce").

[33] Collins Decl. ¶ 6.

Many state university residency programs regularly match with residents from the six designated countries. For instance, before the revised Order, the University of Massachusetts residency program had already interviewed—and was considering ranking—residency applicants from the designated countries.[34] If a program's matched residents are precluded from obtaining a visa under § 2(c), the program risks having an insufficient number of residents to meet staffing needs.[35] The 2017 match took place on March 17, one day after the revised Executive Order was scheduled to take effect.[36] And now, "[a]s many as several hundred doctors from the six [designated countries] will not be able to begin medical residencies" for which they have matched unless waivers are granted.[37]

In addition, if current residents who are nationals of the designated countries cannot renew or extend their visas—as § 2(c) threatens—state university residency programs will be unable to continue to employ them; these multi-year programs will then be left with unfilled positions, and further staffing gaps will result.[38] State medical institutions that have

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[34] *Id.*; *see also* Decl. of Tim Johnson, Ex. M, ¶ 13 (New York hospitals also considered such applicants).

[35] Collins Decl. ¶¶ 7-8; *see also* Decl. of Eric Scherzer, Ex. L, ¶ 16 (ban will have "significant negative impact" and "will result in lower ranked medical students working in New York's hospitals").

[36] Collins Decl. ¶ 6.

[37] Petulla, *supra* n.20 (figure reported by the Association of American Medical Colleges).

[38] *See, e.g.*, Scherzer Decl. ¶ 7 (second-year internal medicine resident at one of New York's public hospitals was unable to

relied on accepted offers of employment from professionals in the designated countries are likewise facing unexpected and critical staffing shortages, additional costs, and administrative burdens, as those professionals cannot or will not take up the offered positions. These disruptions have translated to uncertainty in residency training programs as well as threats to the provision and quality of health care services.[39] And because patients at our medical facilities must be cared for, our facilities must quickly adapt to any staffing complications resulting from § 2(c)—and spend precious time and resources preparing to do so.[40]

Diminished Tax Revenues and Broader Economic Harms. In addition to losing the tuition,[41] room and board, and other fees paid by students at our public universities, amici States have also suffered other direct and substantial economic losses as a result of the disputed provisions of the Order. Every foreign student (whether attending a public or private college or university), every tourist, every business visitor, and every refugee arriving in our States contributes to our economies through their purchases of our goods and services and the tax receipts that their presence generates. Despite the present preliminary injunctions, over the past nine months the

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return to his position when he was denied reentry into the United States after a family visit in Sudan).

[39] See *infra* at 20-21 and accompanying notes.

[40] Scherzer Decl. ¶ 14 ("Even the shortage of one physician can have a significant impact on a safety-net hospital and the patients they treat.").

[41] International students typically pay higher, non-resident tuition rates. *See, e.g.*, Adams Decl. ¶ 6.

Executive Order and its predecessor have either blocked or dissuaded thousands of individuals—potential consumers all—from entering the amici States, thereby eliminating the significant tax contributions those individuals would have made. That lost revenue will never be recovered and the lasting economic damage cannot be undone, even if respondents ultimately prevail.

The contribution of foreign students alone to our States' economies is immense. A survey by the Institute of International Education conducted in the months following the issuance of the travel ban found that "more than 15,000 students enrolled at U.S. universities during 2015-16 were from the [six] countries named in [the revised Executive Order]"; more than half of those students attended institutions in the amici States and Hawaii; and, nationwide, "these students contributed $496 million to the U.S. economy, including tuition, room and board and other spending."[42] For example, in both New York and Illinois, nearly 1,000 foreign nationals from the designated countries were studying on temporary visas in 2015-16 in each State, and they collectively contributed approximately $30 million to each State's economy.[43] And such figures do not even begin to account for the indirect economic benefits to our States, such as the contributions of international students and scholars to innovation in academic and medical research.

Tourism dollars are also a critical component of amici States' economies. As a result of the travel ban,

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[42] Institute of Int'l Educ., *Advising International Students in an Age of Anxiety* 3 (Mar. 31, 2017) (internet).

[43] *See id.* at app. 1.

an estimated 4.3 million fewer tourists are expected to visit the United States this year, resulting in $7.4 billion in lost revenue; and in 2018, those numbers will increase to 6.3 million fewer tourists and $10.8 billion in lost revenue.[44] This reduction results from trips not made either because they were prohibited by the parts of the ban that were not enjoined, or because individual travelers were deterred by fear that the injunction would be lifted. One industry analysis has concluded that the "travel ban could cost the U.S. economy more than $18 billion and about 107,000 jobs."[45] And the travel ban's broader chilling effect on tourism seems likely to continue. While the nation-wide preliminary injunctions issued in these cases may have helped to slow the losses in tourism revenue, travel industry experts have nevertheless cautioned that "uncertainty about the Trump Administration's policies could discourage foreign visitors in the months ahead."[46] This is hardly surprising in view of the Administration's clear message to the world that foreign visitors—particularly those from certain regions, countries, or religions—are unwelcome.

The Executive Order has also already inflicted profound economic harm on the amici States, which depend in large part on remaining internationally competitive destinations for companies in the science, technology, finance, health care, and other industries,

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[44] *See* Abha Bhattarai, *Even Canadians are Skipping Trips to the U.S. After Trump Travel Ban*, Wash. Post (Apr. 14, 2017) (internet).

[45] Jeff Glueck, *Coming to America?*, Foursquare Direct, Medium (blog post) (May 24, 2017) (internet).

[46] Alana Wise, *Travel to the United States Rose in April, But Industry Remains Wary*, Reuters (June 6, 2017) (internet).

as well as for entrepreneurs. Even a temporary disruption in our ability to attract such individuals and entities places the institutions and businesses in our States at a competitive disadvantage in the global marketplace, particularly where the excluded individuals possess specialized skills or training. For example, in just the first week after announcement of the Administration's initial travel ban, $185 million in business traveler reservations was lost.[47] The message of intolerance and uncertainty conveyed by the Order therefore threatens amici States' ability to continue attracting and retaining the foreign professionals, entrepreneurs, and companies that are vital to our economies.

Although defendants assert (Defs. Br. 34) that all the aforementioned "alleged injuries" were "speculative, not actual or imminent, when respondents filed suit," declarations from affected businesses and state institutions show that the myriad harms to the States began to occur the moment that the travel ban was announced; moreover, as detailed above, those harms are both particularized and well-documented. Thus, as the experience of the amici States shows, the Establishment Clause and INA violations at the heart of the Executive Order have directly caused widespread injuries to the States, well beyond just those incurred by its application to any particular foreign national (*id.*).

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[47] Brad Tuttle, *"Trump Slump" Could Mean Well Over $10 Billion Per Year in Lost Tourism Revenues*, Time (Mar. 2, 2017) (internet).

B. Harms to States' Sovereign and Quasi-Sovereign Interests

The harms inflicted on the States by the disputed provisions of the Order extend further than the proprietary interests described above, and include injuries to our sovereign interests.

Decreased Effectiveness of Our Anti-Discrimination Laws. The amici States have exercised their sovereign prerogatives to adopt constitutional provisions and enact laws that protect their residents from discrimination. For example, our residents and businesses—and, indeed, many of the amici States ourselves—are prohibited by such state enactments from taking national origin and religion into account when determining to whom they can extend employment and other opportunities.[48] The disputed provisions of the Order interfere with the effectiveness of these laws by encouraging discrimination against Muslims in general, and nationals of the six designated countries in particular.

Harms to Residents Seeking Medical Care. The Executive Order will harm residents seeking medical care in our States, particularly those in

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[48] *See, e.g.*, Cal. Const. art. I, §§ 4, 7-8, 31; Cal. Gov't Code §§ 11135-11137, 12900 et seq.; Cal. Civ. Code § 51(b); Conn. Gen. Stat. § 46a-60; Ill. Const. art. I, §§ 3, 17; 740 ILCS 23/5(a)(1); 775 ILCS 5/1-102(A); 775 ILCS 5/10-104(A)(1); 5 Maine Rev. Stat. Ann. §§ 784, 4551-4634; Md. Code Ann., State Gov't § 20-606 Mass. Gen. L. ch. 151B, §§ 1, 4; Mass. Gen. L. ch. 93, § 102; N.M. Const. art. II, § 11; N.M. Stat. Ann. § 28-1-7; Or. Rev. Stat. § 659A.006(1); R.I. Gen. Laws § 28-5-7(1)(i); 9 Vt. Stat. Ann. §§ 4500-4507; 21 Vt. Stat. Ann. § 495; Wash. Rev. Code § 49.60.030(1).

underserved communities. In New York, safety-net hospitals—which include all public acute care hospitals, the entire New York City Health and Hospitals system, and most of the hospitals in Brooklyn, Queens, and the Bronx—rely heavily on foreign national physicians.[49] Indeed, many foreign national physicians work in the primary care field at a time when primary care physicians are in short supply in many areas across the country.[50]

At least 7000 physicians practicing in the United States attended medical school in one of the six designated countries, and these physicians provide 14 million appointments a year, 2.3 million of which are in areas with "a shortage of medical residents and doctors."[51] When residents or physicians from the designated countries are unable to commence or continue their employment at public hospitals, those staffing disruptions will result in serious risks to the quality of our States' health care services and put the public health of our communities at risk.[52] Researchers have concluded that the Order is "likely to hurt the health of millions of Americans . . . who

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[49] Scherzer Decl. ¶¶ 10-12.

[50] *Id.* ¶¶ 11, 13; *see also* Decl. of Marc Overbeck, Ex. P, ¶¶ 2-7.

[51] Immigrant Doctors Project, https://immigrantdoctors.org; Decl. of Tim Johnson, Ex. M, ¶ 4 ("Physician trainees are an integral part of New York's health care workforce . . . caring for many underserved New Yorkers [in] great need"); *see also* Anna Maria Barry-Jester, *Trump's New Travel Ban Could Affect Doctors, Especially in the Rust Belt and Appalachia*, FiveThirtyEight (Mar. 6, 2017) (internet); Decl. of Mitra Akhtari, Ex. Q, ¶¶ 13-17.

[52] See *supra* at 13-15 and accompanying notes.

rely on physicians trained in" the designated countries.[53]

Harms to Refugee Resettlement. Sections 6(a) and 6(b) of the Order hinder the efforts of the amici States to carry out their commitments to help resettle and assist refugees admitted under the U.S. Refugee Program established by Congress. For example, between 2012 and 2015, California accepted 23,393 refugees, including 5,668 from Iran, 225 from Syria, and 119 from Sudan.[54] In Fiscal Year 2016, California resettled 1,450 Syrian refugees, more than any other State.[55] In that same time period, New York resettled a total of 5,028 refugees, including 640 from Syria and 819 from Somalia.[56] And in 2016, Illinois resettled 794 refugees from four of the six designated countries (Iran, Somalia, Sudan, and Syria) in Chicago alone.[57]

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[53] Akhtari Decl. ¶ 5; *see also* Maryam Saleh, *Hospitals in Trump Country Suffer As Muslim Doctors Denied Visas to U.S.*, The Intercept (Aug. 17, 2017) (internet) (foreign physicians "take care of the sickest of the sick and the poorest of the poor," many have pledged to work in areas designated as "medically underserved," and without them "the U.S. healthcare system would simply collapse, with the pain felt most acutely in rural areas").

[54] U.S. Dep't of Health & Human Services, Administration for Children & Families, Office of Refugee Resettlement, *Refugee Arrival Data* (Nov. 24, 2015) (internet).

[55] Hannah Albarazi, *California Leads the Nation in Resettlement of Syrian Refugees*, CBS SF Bay Area (Sept. 29, 2016) (internet).

[56] New York State Office of Temporary & Disability Assistance, Bureau of Refugee & Immigrant Assistance (BRIA), BRIA Population Data for FFY 2016 (internet).

[57] U.S. Dep't of State, Bureau of Population, Refugees & Migration, Office of Admissions, *Refugee Processing Center: Interactive Reporting* (internet).

By suspending the Refugee Program, the Executive Order has stranded thousands of refugees—who have already been extensively vetted—in crisis zones, in many cases isolating them from family members who are already in the United States. And the Order indefinitely excludes tens of thousands of otherwise eligible refugees by reducing the cap on refugee admission for Fiscal Year 2017 by more than half, from 110,000 to 50,000. *See* Order § 6(b).

Not only do these exclusions obstruct the States' interests in resettling refugees who may have ties to our residents and communities, but they also result in proprietary harms to the States, which receive grants and other financial assistance from the federal government for each refugee they take in. *See* 45 C.F.R. pt. 400. For example, New York State's Office of Temporary and Disability Assistance receives federal funding in respect of the assistance that New York's Refugee Services Programs provide "to refugees and their families in achieving economic and social self-sufficiency."[58] Refugees residing in our States contribute to our economies in other ways too, including payment of taxes, purchases of goods and services, and employment in our businesses and community institutions. In addition, the private organizations in our States that help resettle refugees now face crippling reductions in staffing and resources

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[58] New York State Office of Temporary & Disability Assistance, *Refugee Services* (internet); *see also* U.S. Dep't of Health & Human Services, Administration for Children & Families, Office of Refugee Resettlement, *State of New York – Programs and Services by Locality* (Nov. 18, 2015) (internet).

because their funding is likewise allocated on a per-arrival basis.[59]

II. Harms Caused By the Order Are Cognizable Under the Establishment Clause

Defendants assert (Defs. Br. 33-34) that the States have no cognizable Establishment Clause interests, but that claim is flatly contradicted by the original meaning and purpose of the Clause. One of the original purposes of the Clause was to prevent the federal government from forcing its religious preferences upon the States.[60] As Justice Thomas has noted, in this regard the Establishment Clause was designed to serve as "a federalism provision." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in judgment); *see also Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1836 (2014) (Thomas, J., concurring) (["T]he States are the particular beneficiaries of the Clause."). To be sure, the States' original power over religious matters was later limited by the Fourteenth Amendment's Due Process and Equal Protection Clauses. *See Everson v. Board of Educ.*, 330 U.S. 1 (1947). And the defendants are correct (*see* Defs. Br. 33) that States are no longer free to establish official churches. But the Constitution continues to protect state efforts to welcome diverse religious groups and combat religious

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[59] Decl. of Eva Hassett, Ex. N, ¶¶ 10-11, 17-25; Decl. of David Duea, Ex. O, ¶ 9.

[60] *See, e.g.*, Joseph Story, *Commentaries on the Constitution of the United States*, § 1879, at 633-34 (5th ed. 1891); Akhil Amar, *The Bill of Rights* 32-42 (1998); Amar, *supra*, at 246-257.

discrimination, including through enforcement of our own state anti-discrimination laws.

The disputed provisions of the Order are tainted by anti-Muslim animus in violation of the Establishment Clause. As respondents explain (*see* Hawaii Br. 52-60; IRAP Br. 37-40, 43-50, 55-56), the Order establishes this animus as federal policy and paves the way for a religious test for entry to the United States. Numerous statements by the President and his close advisors both before and after the election (*see* Hawaii Br. 5-10; IRAP Br. 1-4; J.A. 219-222) make clear that both § 2(c) and § 6 of the Order seek to make good on the President's promise of a "Muslim ban," thereby affecting the religious makeup of our States and communities. All of these statements were directly related to banning Muslim immigration, and in many cases were virtually contemporaneous with the issuance of this Executive Order and its predecessor. As the Fourth Circuit correctly recognized, the "sheer number of statements, their nearly singular source, and the close connection they draw" between the proposed Muslim ban and the Orders, "taken together, provide direct, specific evidence of what motivated" them—the President's "desire to exclude Muslims from the United States," as well as his "intended means of effectuating the ban by targeting majority-Muslim nations instead of Muslims explicitly" (J.A. 222).[61]

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[61] Unlike a statute, which is the act of a collective body, and therefore presents some difficulties in discerning legislative intent from the statements of individual legislators, the Executive Orders at issue here are the acts of a single official, and there is no such barrier to treating the President's statements as probative of his intent in promulgating those Orders.

By unlawfully injecting religious bias into our Nation's immigration policy, the Order impairs the constitutionally protected interest that the amici States and Hawaii possess in prohibiting religious discrimination and maintaining welcoming communities where people of all faiths or no faith feel welcome. It does so not only by excluding large numbers of Muslims, but also by contributing to an environment of fear and insecurity among our residents that runs counter to the amici States' deeply held commitment to inclusiveness and equal treatment.[62]

Moreover, blocking the admission of individuals based on their religious beliefs has a substantial harmful effect on amici States and Hawaii by, among other things, reducing tax revenues—an effect which by itself is sufficient to establish standing. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 449-50 (1992); *see also Washington v. Trump*, 847 F.3d 1151, 1160-61 (9th Cir. 2017) (holding Washington and Minnesota had sufficiently "alleged harms to their proprietary interests traceable to the [January] Executive Order" to confer standing for purposes of States' constitutional challenge), *reconsideration en banc denied*, 853 F.3d 933, *amended and superseded by*, 858 F.3d 1168 (9th Cir. 2017).

While the States have until now not had occasion to assert this Establishment Clause interest against the federal government, that proves only that the federal government has rarely—if ever before—taken

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[62] See *supra* at 19 & n.48; *see also* Janice Williams, *Under Trump, Anti-Muslim Hate Crimes Hate Crimes Have Increased at an Alarming Rate*, Newsweek (July 17, 2017) (internet) (91% increase in anti-Muslim hate crimes in the country in the first half of 2017 as compared to same time period in 2016).

action that so plainly violates the States' rights under the Clause. In these extraordinary circumstances, Hawaii and the amici States have standing to protect their own interests by vindicating the structural dictates of the Establishment Clause. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 518–20 (2007).

III. Harms Caused By the Order Are Cognizable Under the Immigration and Nationality Act.

To press a statutory claim, a plaintiff must show among other things that the interests the plaintiff seeks to vindicate "fall within the zone of interests protected by the law invoked." *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (internal quotation marks omitted). As the Ninth Circuit correctly held, Hawaii's "interests in student- and employment-based visa petitions for its students and faculty are related to the basic purposes of the INA" (J.A. 1188-1189), a statute that contains numerous provisions governing the admission of foreign-national students, scholars, and faculty into the United States on temporary nonimmigrant visas[63] or employment-based immigrant visas.[64]

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[63] *See, e.g.*, 8 U.S.C. §§ 1101(a)(15)(F)(i) (students pursuing a full course of study, commonly known as the "F-1" category); 1101(a)(15)(H)(i)(b) (aliens in specialty occupations, commonly known as the "H-1B" category); 1101(a)(15)(J) (students, scholars, medical residents, and others in fields of specialized knowledge and skill, commonly known as the "J-1" category); 1101(a)(15)(O)(i) (aliens with extraordinary abilities in the sciences, arts, education, business, or athletics, commonly known as the "O-1" category).

[64] *See, e.g.*, 8 U.S.C. §§ 1153(b)(1)(A) (aliens with extraordinary abilities in the sciences, arts, education, business

Indeed, our state colleges and universities are in many cases the entities petitioning for approval of a potential employee's entry into the United States, bringing them directly within the ambit of the INA. As employers, our universities sponsor and file employment-based immigrant or non-immigrant/ temporary worker petitions with U.S. Citizenship and Immigration Services on behalf of certain of our prospective employees.[65] Only after the employer's petition is approved can the prospective employee apply for and receive a work visa. In some cases, the INA also requires the employer to obtain an approved labor certification from the U.S. Department of Labor, *see* 8 U.S.C. § 1182(5)(A), before filing a petition.[66]

Section 2(c) of the Order, by interfering with this process, has substantially disrupted the ability of our public institutions to meet their academic staffing needs, resulting in increased administrative burdens and the expenditure of additional university

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or athletics); 1153(b)(1)(B) (outstanding professors or researchers); 1153(b)(2) (professionals holding advanced degrees or aliens of exceptional ability in the sciences, arts, or business); 1153(b)(3)(A)(ii) (professionals with baccalaureate degrees); *see also* U.S. Dep't of State, 9 Foreign Affairs Manual 502.4, *Employment-Based [Immigrant Visa] Classifications* (internet).

[65] *See* U.S. Dep't of State, *Temporary Worker Visas, Categories and Overview* (internet); U.S. Customs & Immigration Servs., *Temporary (Nonimmigrant) Workers* (internet); U.S. Dep't of State, *Employment-Based Immigrant Visa, Categories and Overview* (internet).

[66] *See* U.S. Customs & Immigration Servs., *Permanent Workers* (internet); U.S. Dep't of State, *Employment-Based Immigrant Visa, Categories and Overview* (internet); U.S. Dep't of State, *Temporary Worker Visas, Categories and Overview* (internet).

resources. See *supra* at 5-8. The Order has also caused the wastage of some of the funds that the amici States have spent preparing visa petitions for employees or prospective employees, by barring or threatening to bar those persons from entry. For example, in order to support the retention and recruitment of faculty and other personnel, the State University of New York provides legal and financial support for the immigrant and nonimmigrant work petitions of certain prospective employees, including teaching faculty, researchers, physicians, and other qualified health professionals.[67] Specifically, the University will "provide assistance . . . in the preparation of employment-based petitions and applications for nonimmigrant categories such as the H-1B Temporary Worker, O-1 Extraordinary Ability and the TN-1 NAFTA categories."[68] In addition to such "employment sponsorship," the University also provides "related financial support for standard processing, government filing fees and [other related] costs."[69] And for those working under employment-based immigrant visas, the University will help "prepare

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[67] *See* State Univ. of N.Y. (SUNY), Legal and Financial Support for Immigration Petitions Policy, Doc. No. 8500, §§ I(C), II(A) (internet).

[68] *Id.* § I(C). Although an employer may in some cases itself file a petition on behalf of a prospective employee under the TN NAFTA category, in other cases the employee applies directly. *See* U.S. Customs & Immigration Servs., *TN NAFTA Professionals* (internet).

[69] SUNY, Immigration Petitions Policy, *supra*, § II(A); *see also id.* §§ III(F)(1), (2).

petitions and applications" for "permanent residence based on University employment."[70]

Because state universities acting as employers are direct and necessary participants in the INA's scheme for the filing of employment-based petitions, they fall within the zone of interests of the statute. And as employers, they have suffered concrete injuries as a result of § 2(c). Defendants' only argument in this regard is a conclusory assertion (Defs. Br. 34-35) that Hawaii has no cognizable interest under the INA "in the federal government's determination whether to allow an alien abroad to enter the United States." While States certainly understand that there is no absolute right to the issuance or renewal of a particular individual's visa, our state institutions—like other employers of foreign nationals—have come to rely on a degree of predictability in the visa system in making their critical faculty hiring and student admissions decisions, including an expectation that visa determinations will be free from discriminatory animus. *See* 8 U.S.C. § 1152(a)(1)(A) ("[N]o person shall . . . be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence"). All of this was abruptly upended by § 2(c), injuring the States' statutorily protected interests.

Accordingly, defendants are simply mistaken in asserting (Defs. Br. 34) that Hawaii falls outside the INA's zone of interests and thus lacks standing to assert its statutory challenge. *See Bank of America*

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[70] *Id.* § I(C). The University does not itself prepare and file student petitions, but it does provide "advice and assistance to international students and scholars through . . . the University's F-1 Student and J-1 Exchange Visitor programs." *Id.*

Corp. v. City of Miami, Fla., 137 S. Ct. 1296, 1303 (2017) (plaintiff City of Miami had standing to assert statutory claim where injuries were "*arguably* within the zone of interests" protected by the statute) (emphasis in original and internal quotation marks omitted).

IV. The Injuries to Public Interests Throughout the Country Support the Issuance of Nationwide Preliminary Injunctions in These Cases

The actual and threatened harms to the amici States (see *supra* Point I) exemplify the public interests affected by the Order and demonstrate the appropriateness of restraining the Order's disputed provisions nationwide. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). As this Court has long recognized, district courts exercising their equity jurisdiction enjoy broad and "sound discretion to consider the necessities of the public interest when fashioning injunctive relief." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 496 (2001) (internal quotation marks omitted). Indeed, "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than . . . when only private interests are involved." *Virginian Ry. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937); *see also Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 420 (1977) (recognizing where "there has been a systemwide impact [there may be] a systemwide remedy").

Affirmance of the preliminary injunctions is necessary to provide relief from the disruption and uncertainty the Executive Order has caused, and to avoid the further harms that will be experienced by

the amici States, our institutions, and our residents if the preliminary injunctions are vacated or narrowed. Indeed, until this Court makes clear that religious animus has no place in federal immigration policy, the prospect that a new entry ban could be ordered will continue to deter future travel by foreign nationals to the United States long after the current Executive Order's expiration date.[71] More specifically, as long as an entry ban based on religious animus remains in effect, state universities and colleges will continue to have difficulties recruiting and retaining the faculty and students that their programs require. Many students from the six designated countries may choose not to apply to colleges and universities in the United States in the coming years,[72] or not to accept offers of admission from those educational institutions.

Indeed, the climate of uncertainty and discrimination created by the Executive Order already appears to have deterred applications and acceptances from around the world. Forty percent of colleges surveyed report a drop in applications from foreign students in the wake of both the original and revised Executive

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[71] *See, e.g.*, Donald Trump (@realDonaldTrump), Twitter (Sept. 15, 2017 3:54 a.m. PT) (internet) ("The travel ban into the United States should be far larger, tougher and more specific—but stupidly, that would not be politically correct!"); *see also* Order §§ 2(a)-(f) (establishing process for expanding the ban).

[72] The University of Washington, for instance, has received various communications from prospective students from the affected countries expressing anxiety about applying in light of the travel ban. Eaton Decl. ¶ 5 & exhibit 2; *see also* Chaudhry Decl. ¶ 9 (international applications for Washington State University's special education teacher certification program down from 63 in 2016 to only 10 in 2017).

Orders.[73] Graduate departments in science and engineering have reported that "international student applications for many programs declined by 20 to 30 percent for 2017 programs."[74] Additionally, 80% of college registrars and admissions officials surveyed have serious concerns about their future application yields from international students.[75] And 46% of graduate deans have reported "substantial" declines in admission yields for international students.[76] Not surprisingly, countries that are perceived as more welcoming—such as Canada, the United Kingdom, Australia, and New Zealand—have already seen a jump in applications following issuance of the Orders.[77] Similarly, until this Court affirms the nationwide preliminary injunctions at issue here, the uncertainty the Executive Order creates will continue to act as a drag on our States' medical residency programs. For example, in New York, the uncertainty created by both the Orders has had a "profound chilling effect on international medical students applying to New York hospitals' residency programs and [will be] a major disincentive for hospitals to select foreign nationals for [their] programs."[78]

Only a clear statement of the Executive Order's unlawfulness will allow our States, universities,

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[73] Kirk Carapezza, *Travel Ban's 'Chilling Effect' Could Cost Universities Hundreds of Millions*, Nat'l Pub. Radio (Apr. 7, 2017) (internet).

[74] Petulla, *supra*.

[75] Carapezza, *supra*.

[76] Hironao Okahana, *Data Sources: Admissions Yields of Prospective International Graduate Students: A First Look* (Council of Graduate Schools, June 2017) (internet).

[77] Carapezza, *supra*.

[78] Scherzer Decl. ¶ 15; *see also* Johnson Decl.¶¶ 13-14.

hospitals, and businesses—and the people they serve—to move past the Order and the harm, disruption, and uncertainty it has unleashed.

CONCLUSION

The judgments of the Courts of Appeals should be affirmed.

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